

**FCC MAIL SECTION**

Before the  
Federal Communications Commission  
Washington, D.C. 20549  
JAN 28 10 49 AM '93

MM Docket No. 93-8 RECEIVED BY

In the Matter of

Implementation of Section 4(g) of the  
Cable Television Consumer Protection  
Act of 1992

Home Shopping Station Issues

**NOTICE OF PROPOSED RULEMAKING**

Adopted: January 14, 1993; Released: January 28, 1993

Comment date: March 29, 1993

Reply comment date: April 13, 1993

By the Commission:

**INTRODUCTION**

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act").<sup>1</sup> In this proceeding we seek comment on the adoption of implementing regulations relating to stations that are predominantly utilized for the transmission of sales presentations or program length commercials ("home shopping stations") and issues regarding the carriage of such stations on cable systems.

2. Section 4 of the Cable Act of 1992 added a new Section 614(g) to the Communications Act of 1934, as amended, 47 U.S.C. Sec. 533(g), which requires the Commission to determine, regardless of prior conclusions, whether home shopping stations are serving the public interest, convenience, and necessity. That section further provides that the Commission shall consider in its determination the viewing of home shopping stations, other demands on the television spectrum now utilized by such stations, and the role of such stations in providing competition with cable home shopping services. The 1992 Cable Act further requires that if the Commission finds that these stations do serve the public interest, then it shall qualify them as local commercial television stations for the pur-

poses of cable carriage. If the Commission finds that one or more such stations do not serve the public interest, then the Act requires that the Commission provide them with reasonable time to provide different programming.

**BACKGROUND**

3. A home shopping station presents programming that offers for sale a variety of goods or services, soliciting viewers to purchase such goods directly from the programmer. Between 1969<sup>2</sup> and 1984,<sup>3</sup> Commission policy precluded or discouraged home shopping station formats based on a perception that such formats "subordinate[d] programming in the interest of the public to programming in the interest of its salability."<sup>4</sup> Our elimination in 1984 of the guidelines on commercial matter for broadcast stations again made such formats permissible.<sup>5</sup> The Commission based this policy change on the assumption that viewer preferences and market forces would govern commercial loads and that stations would not survive economically if viewers were dissatisfied with the level of commercialization. The Commission also expressed its preference for direct viewer control over content through the reflection of their preferences in the market rather than governmental regulation of programming content.<sup>6</sup>

4. Under our current regulations, home shopping stations have the same fundamental obligation as other broadcast stations to provide programming that responds to issues of concern to their communities of license.<sup>7</sup> Similarly, with regard to serving the needs and interests of children, home shopping stations must comply with the same rules that apply to other television broadcast stations.<sup>8</sup> Moreover, the Commission traditionally does not take station format differences into account in formulating regulatory policy,<sup>9</sup> a practice that "reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion."<sup>10</sup>

**DEFINITION OF STATIONS "PREDOMINANTLY UTILIZED FOR THE TRANSMISSION OF SALES PRESENTATIONS OR PROGRAM LENGTH COMMERCIALS"**

5. The initial issue we must address and on which we solicit comment is how to identify the stations that are the subject of Section 4 of the 1992 Cable Act, i.e., stations that are predominantly utilized for the transmission of sales presentations or program length commercials. We could interpret the provision to refer to stations that devote more than a specific number of hours per day to a home shopping format. For example, the provision could apply to stations that devote more than eight hours per day (or a third of the broadcast day) between the hours of 6:00 a.m.

<sup>1</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>2</sup> *Topper Corporation*, 21 FCC 2d 148 (1969).

<sup>3</sup> *Report and Order* in MM Docket No. 83-670 (*Television Deregulation*), 98 FCC 2d 1076 (1984).

<sup>4</sup> *Topper Corporation*, above, at 149.

<sup>5</sup> Since that time, approximately 100 broadcast television stations have affiliation agreements with the Home Shopping Network, a provider of home shopping programming.

<sup>6</sup> *Television Deregulation*, above, at 1101-05.

<sup>7</sup> See *Television Deregulation* at 1077.

<sup>8</sup> See *Memorandum Opinion and Order* in MM Docket Nos.

90-570 and 83-670, 6 FCC Rcd 5093, 5096 (1991), *recon. denied*, 7 FCC Rcd 3197 (1992) (*Policies and Rules Concerning Children's Programming*).

<sup>9</sup> See generally *Memorandum Opinion and Order* in Docket No. 20682, 66 FCC 2d 78 (1977) (*Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*), *rev'd sub nom. WNCN Listeners Guild v. F.C.C.*, 610 F.2d 838 (D.C. Cir. 1979) (en banc), *rev'd, F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding Commission policy not to conduct renewal review of radio station's format change).

<sup>10</sup> *WNCN Listeners Guild*, above, at 596.

and midnight to a home shopping format. Alternatively, we note that we have sought comment in another proceeding on whether we should consider a channel to be "predominantly utilized" for home shopping purposes if more than 50 percent of its programming week consists of sales presentations or program length commercials.<sup>11</sup> Another option before us is to consider only the broadcast station's prime time programming. Commenters should address how to define, within the intent of Congress, the stations that are subject to this proceeding.

#### **ARE HOME SHOPPING STATIONS SERVING THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY"**

6. Current policy and the continued licensing and renewal of home shopping stations, as well as the proliferation of these stations and their nonbroadcast counterparts, reflect the Commission's assumption over the course of the last decade that stations of this type are operating in the public interest. Our task here, however, is to evaluate "notwithstanding prior proceedings" whether such stations are now serving the "public interest, convenience, and necessity." In making this judgment, the 1992 Cable Act directs us to consider three specific factors: (1) the viewing of home shopping stations by the public; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to nonbroadcast services offering similar programming. Thus, to assist in making the required public interest judgment, we seek comment on these three factors, as well as on other matters that may be helpful in resolving this issue. Such matters include, in particular, whether the assumptions underlying the deregulation of the commercial guidelines are still valid, and whether home shopping stations provide a needed or valuable service for people who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing process involved. Commenters are also invited to submit information regarding how home shopping broadcast stations have been meeting their public interest obligations.

7. Turning to the first of the three enumerated factors, we seek comment on the viewing of home shopping broadcast stations. To the extent that data on the viewership (or "ratings") of such stations is not generally reported, we ask commenters how we can best determine the levels of viewership of home shopping broadcast stations. We have never before used a station's ratings as a factor to determine whether the licensee has met its public interest obligations. We therefore also request comments addressing the means and standards of weighing ratings to ascertain whether the public interest is being served. Should we interpret a high viewership for home shopping stations as an indication that they serve the public interest? If so, how, if at all, should we factor low ratings into the public interest determination? With what stations should home shopping station ratings be compared? For example, should the comparison be with stations of comparable age? We note that basing the choice of formats on ratings, which reflect the popularity of a program or format, could im-

plicate difficult First Amendment concerns. Thus, we seek comment on the extent of the First Amendment and other public interest concerns raised by using viewership information, as well as approaches to that problem that may minimize those concerns.

8. The 1992 Cable Act also states that another factor which we should use in determining whether home shopping stations serve the public interest is the level of competing demands for the spectrum allocated to such stations. In this regard, we seek comment on whether the statute directs the Commission to consider the demands only of other television broadcasters or, more generally, those of applicants, permittees, and licensees in other services (such as land mobile and advanced television). We therefore ask commenters to discuss how we can use the competition for scarce spectrum to determine the utility of home shopping stations. We note that in accordance with Section 307 of the Communications Act of 1934, as amended, the licensees of home shopping stations, like those of all other television broadcast stations, must demonstrate every five years to the Commission that the public interest will be served by renewal of their licenses.<sup>12</sup> At such time, any party in interest can object to the renewal. Moreover, any party qualified to hold a Commission license can file a competing application against the renewal, giving it the opportunity to replace the existing licensee, should that be in the public interest. We ask commenters to address whether the existing Congressionally mandated license renewal scheme adequately takes into account the competing demands of television broadcasters for the television broadcast spectrum.

9. Another factor the Cable Act of 1992 requires us to use in analyzing whether home shopping stations are serving the public interest is their role in providing competition to nonbroadcast services offering similar programming. Two aspects of the competitive relationships involved appear to be implicated in addressing this statutory factor. First, broadcast licensees, unlike nonbroadcast programmers, are required to provide programming that responds to issues of concern to their communities of license and to comply with other regulations associated with the Commission's broadcast station license application and renewal process.<sup>13</sup> Nonbroadcast distributors of identical or similar programming are not subject to these obligations. Thus, with respect to this aspect of the competition between the broadcast and nonbroadcast services, commenters may wish to consider whether the broadcast services suffer from potential commercial disadvantages as a result of their Commission-imposed public interest obligations. Commenters also are invited to address whether a conclusion that broadcast home shopping stations are operating in the public interest and thus entitling them to local cable carriage is an appropriate response to any competitive disparity that may exist.

10. The second aspect of the competitive analysis engages the question of the public interest in providing cable subscribers with home shopping competitive options. Both the 1984 and 1992 Cable Acts have as fundamental purposes ensuring the widest possible diversity of information sources and services through cable television and other dis-

<sup>11</sup> Notice of Proposed Rulemaking in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 7 FCC Rcd 8055, 8062 (1992).

<sup>12</sup> 47 C.F.R. Sec. 73.1020(a).

<sup>13</sup> See, e.g. Sections 307 and 309 of the Communications Act of

1934, as amended, 47 U.S.C. Sections 307, 309. See also 47 C.F.R. Sections 73.606 (allotment of television channels to particular communities) and 73.1125 (main studio rule).

tribution media. Thus, acting to ensure that cable subscribers and the public generally have access to competitive home shopping services would appear to be consistent with Congressional objectives. Some cable systems deliver more than one service containing home shopping and thus, at least with respect to these systems, an appearance of competition exists. However, such multiple services may not be fully competitive. For example, a cable operator may have either an ownership or a contractual interest in a nonbroadcast provider of home shopping programming. A contractual interest is created when a nonbroadcast home shopping programmer has its presentation carried by a local cable company and pays the cable operator a percentage of those sales that originate from certain addresses or zip codes. Under such an agreement, the cable operator has a direct financial stake in the success of the nonbroadcast home shopping programmer, and vertical integration is created by contract. We seek comment on whether cable operators with either ownership or contractual interests in nonbroadcast providers of home shopping programming have elected not to carry home shopping broadcast stations or have treated such stations less favorably than the nonbroadcast home shopping services with which they are affiliated. If so, we also seek comment on whether these decisions have resulted in stifling competition and reducing the viewing choices of the public. Given Congress' concern with both the efficiencies and the potential drawbacks of vertical integration,<sup>14</sup> we ask commenters how the Commission can best promote programming diversity and market competition in the context of the carriage of home shopping stations. We also request commenters to address whether we should distinguish between ownership and contractual relationships in our analysis.

11. Section 4(g)(2) of the 1992 Cable Act suggests the possibility that "one or more" home shopping stations may not be found to be operating in the public interest. While it is our tentative view that a generalized decision of broad applicability is appropriate, this provision of the Act indicates that, in certain circumstances, individual judgments as to specific stations may be warranted, rather than a general rulemaking judgment as to this class of stations as a whole. Thus, for example, the issue of alternative demands on the spectrum or the existence of alternative, nonbroadcast suppliers of home shopping programming may vary according to the region or market involved. We seek comment on whether such individualized reviews are contemplated or mandated by the Act, and by what process they might be reached, if warranted.

#### PROCESS FOLLOWING PUBLIC INTEREST DECISION

12. Section 4 of the 1992 Cable Act appears to contemplate two possibilities resulting from our public interest determination regarding home shopping stations: (1) home shopping stations are found to be operating in the public interest, and they become eligible for mandatory cable carriage; or (2) they are found not to operate in the public

interest, and their operations are terminated or modified. A third possibility might be that such stations or some subset of them, although operating in the public interest in such a manner as to warrant continued authorization and renewal, would not warrant mandatory cable carriage. It appears that the language of the Cable Act of 1992 may preclude such a conclusion. Accordingly, we seek comment on whether this latter possibility is permissible under the 1992 Cable Act and, if so, what criteria we might use to distinguish those home shopping stations entitled to carriage.<sup>15</sup>

13. Depending on the public interest decision involved, certain transitional rules will be necessary. If home shopping stations are accorded carriage rights, it will be necessary to ensure that the process whereby those rights are activated are coordinated with the rules adopted in the general mandatory carriage and retransmission consent proceeding now in progress.<sup>16</sup> Should we find that all or some home shopping broadcast stations do not serve the public interest, the 1992 Cable Act directs the Commission to allow such stations a reasonable period within which to provide different programming. We seek comment on our options should we make such a finding. In addressing this issue, commenters should discuss the tension between having Commission licensees serve the public interest as soon as possible, and the potential difficulty of initiating wholesale programming changes to meet that requirement. We tentatively find that 18 months from the adoption date of such a *Report and Order* would be reasonable, and seek comment on this proposal.

#### ADMINISTRATIVE MATTERS

##### A. Regulatory Flexibility Analysis

14. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same deadlines as comments on the other sections of this *Notice of Proposed Rulemaking*. However, such comments must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rulemaking* and regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

<sup>14</sup> See, e.g., *Notice of Proposed Rulemaking* in MM Docket No. 92-264 (*Horizontal and Vertical Ownership Limits*), 58 Fed. Reg. 3523 (January 11, 1993). See also *Notice of Proposed Rulemaking* in MM Docket No. 92-265 (*Development of Competition and Diversity in Video Programming Distribution and Carriage*), 58 Fed. Reg. 328 (January 5, 1993).

<sup>15</sup> For example, such criteria might include: (1) the number of

full power stations in the market available for carriage; (2) the amount of time the station dedicates to its home shopping format; (3) the number of home shopping stations within the market; (4) whether the cable operator carries or has an interest in a nonbroadcast provider of home shopping programming; or (5) some combination of the above or other factors.

<sup>16</sup> *Broadcast Signal Carriage Issues*.

**B. Ex Parte**

15. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

**C. Comments**

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 29, 1993, and reply comments on or before April 13, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

**D. Paperwork Reduction Act Statement**

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public.

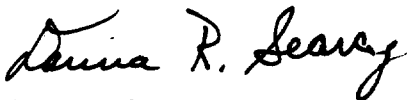
**E. Ordering Clause**

18. Accordingly, IT IS ORDERED that pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, this *Notice of Proposed Rulemaking* IS ADOPTED.

**F. Additional Information**

19. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy  
Secretary

**APPENDIX****Initial Regulatory Flexibility Analysis**

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

1. **Reason for the Action:** The purpose of this *Notice* is to establish rules and regulations in accordance with the Cable Television Consumer Protection and Competition Act of 1992 relating to the development of carriage requirements for home shopping stations.

2. **Objective of this Action:** The Commission's goal is to provide notice and opportunity to comment to members of the public regarding the carriage of local home shopping broadcast stations by cable system operators, as required by Section 4(g) of the 1992 Act.

3. **Legal Basis:** Authority for the action proposed in this *Notice* may be found in Sections 4, 303, and 614(g) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 303, and 533(g).

4. **Description, Potential Impact, and Number of Small Entities Involved:** Approximately 11,000 existing cable systems of all sizes and approximately 100 home shopping broadcast stations may be affected by the proposal contained in this *Notice*.

5. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:** None.

6. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

7. **Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:** The purpose of this *Notice* is to seek comment on issues, including alternatives that would minimize the impact on small entities.